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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 919

DAVID W. PURNELL,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR CERTIORARI

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(a) The decision challenged by this petition was rendered December 17, 1962 by the Arkansas Supreme Court. At the time of preparation of this petition the opinion has not been reported. A copy of the opinion is appended.

(b) The judgment was rendered contemporaneously with the opinion, December 17, 1962 and no petition for rehearing was filed. The cause, initiated in the circuit court of Pulaski County, Arkansas, was founded on 45 USCA §§51 et seq., the Federal Employers Liability Act. Right to apply for review by certiorari is provided in Rule 19 of this court. *Rogers* v. *Missouri Pacific Railroad Co.*, 352 US 500, 1 L ed 2d 493, 77 S Ct 443. Specifically, the Arkansas Supreme Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this court, i.e., that instruction to a jury that an employee protected by the FELA may be phrased in terms of common-

law proximate causation instead of the more liberal language of the Act, as interpreted by this court.

(c) The precise question presented is: Where a jury is instructed in binding terms that an employee entitled to the benefit of FELA must establish that negligence of the railroad was "a proximate cause" of his injury, instead of utilizing the language of the Act, which sets the materially lower standard of proving negligence "in whole or in part", has the Congressional purpose enunciated in FELA been substantially subverted?

(d) The pertinent portion of FELA is 45 USCA § 52:

"Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possession of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

(e) This action was originally instituted in state court at Little Rock, the complaint being predicated on FELA, seeking damage for a back injury sustained by petitioner in the course of employment with respondent as a carman. Trial to a jury resulted in a verdict for respondent. The sole issue on appeal to the Arkansas Supreme Court was

the propriety of an instruction given at respondent's request:

"You are instructed that no presumption arises from the mere happening of an injury to a railroad employee and you cannot guess, surmise or speculate on the issues of negligence, proximate cause or damages. The burden of proof is on the plaintiff to establish by a preponderance of the evidence all of the following: (1) that the defendant railroad was guilty of negligence; (2) that such negligence, if any, was a proximate cause of the plaintiff's injury and damage, if any. If you find and believe that the evidence on any one of these points does not preponderate in favor of the plaintiff, or that the evidence in regard thereto is evenly balanced, then your verdict must be in favor of the defendant, Missouri Pacific Railroad Company."

Specific objection was made that the instruction placed a higher burden on plaintiff than required or permitted under FELA by requiring proof that negligence was a proximate cause rather than "in whole or in part."

Petitioner had requested instructions phrased in the "whole or part" terminology of the Act, none, however, in binding terms which were granted.

The Arkansas Supreme Court, reviewing the instructions, held that there was no conflict between an instruction imposing a burden on an employee to prove that negligence of the railroad was "a proximate cause" of his injury and instructions permitting recovery where negligence "in whole or in part" caused injury.

In essence, the state court has held that these terms import synonym and that a jury may, without prejudicial effect, be instructed that an employee is charged with the burden of proving that railroad negligence was "a proximate cause" of his injury.

It is petitioner's contention that where an employee must assume the heavier burden of establishing proximate causation rather than the slight degree of relationship between act and injury required by the Act, as interpreted by this court, he has been deprived of a substantial right intended to be secured by the Congressional pronouncement.

(f) *Rogers* swept away previous considerations of liability under FELA. In the place of common-law standards was substituted the principle that "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

This concept is decidedly different from common-law proximate cause, under which a substantial relationship between act of an employer and injury of an employee must be demonstrated.

For purposes of this petition, the use of "proximate cause" in an instruction bearing on FELA, without relating it to this court's interpretation of the scope of FELA, results in each state applying its own and frequently divergent definition.

In interpreting FELA, common-law principles need not be depended on, *Sinkler* v. *Missouri Pacific Railroad Company*, 356 US 326, 2 L ed 2d 799, 78 S Ct 758; nor may the federal right embodied in FELA be defeated under the name of local practice, *Arnold* v. *Panhandle & Santa Fe Railway Company*, 353 US 360, 1 L ed 889, 77 S Ct 840.

The availability of certiorari to enforce FELA, even to the extent of reviewing the actions of state courts, was settled by *Rogers*. Here, it is not necessary to indulge in appraisal of evidence, as has been done in prior instances where review was undertaken. No facts could support a legally erroneous, binding, prejudicial instruction. By

placing a heavier burden of evidence on an injured employee than the Act requires, the same type of prejudice occurs as would result if, for example, a jury were told that proof of contributory negligence by the employee constitutes a defense.

When an instruction imposes a greater burden on an employee than the Act requires, the result is reversible error, *Hoyt* v. *Central Railroad*, 243 F(2) 840. This court has not hesitated to reverse for an erroneous instruction, even when appraisal of the evidence is required, *Ward* v. *Atlantic Coast Line R. Co.*, 362 US 396, 4 L ed 2d 820, 80 S Ct 789.

The vice of the challenged instruction was specifically called to the trial court's attention in the form of an objection that "proximate cause" is not the proper standard of FELA, that the term was not defined in the instruction, which was "finding" or "binding". The objection appears at page 26 of the record. Had the term been defined, it was essential that the definition incorporate this court's connotation as announced in Rogers. The Arkansas Supreme Court erroneously held otherwise, concluding that "proximate cause", without further definition, conveyed to the jury the principles of Rogers. That this is untrue is apparent from the definition of "proximate cause" as given by the same court in *Garner* v. *Missouri Pacific Railroad Company*, 195 SW(2) 39, 210 Ark. 214, wherein negligence was said not to be actionable unless it was the "direct cause of the damage", or, as in *Ben M. Hogan & Co.* v. *Krug*, 351 SW(2) 451, 234 Ark. 280, "an efficient cause" of injury.

Simply stated, had an instruction been offered in a common-law case in Arkansas which told the jury that if the negligence of the defendant played any part, even the slightest, in causing plaintiff's injury, plaintiff should recover, the Arkansas court would have reversed any favor-

able judgment because the burden of evidence on the plaintiff was greater; i.e., to establish negligence that was a "proximate cause", meaning a substantial and efficient chain of causation. An instruction couched in the same language is entirely appropriate in a FELA case.

If allowed to stand, the Arkansas Supreme Court decision will represent authority for instructing juries that the liberal construction of FELA announced by this court in *Rogers* and subsequent decisions need not be observed; that common-law principles, imposing a substantially greater burden of evidence on the employee, may be applied. This will result in many employees being deprived of a right which Congress intended to confer upon them in FELA.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

No. 2861

DAVID W. PERNELL, *Appellant*,

v.

MISSOURI PACIFIC RY. CO., *Appellee*

Opinion Delivered December 17, 1962

Appeal from Pulaski County Circuit Court, Third Division

Affirmed.

NEILL BOLLINGER, Associate Justice

The appellant brought this action alleging that as an employee of the appellee railroad he was injured in the course of his employment through the negligence of appellee and sought damages under the Federal Employer's Liability Act [commonly referred to as FELA].

The trial resulted in a verdict for the appellee and the appellant prosecutes this appeal, presenting an abbreviated record and relying upon the following points:

> "Appellee's Instruction #3 was prejudicially erroneous in (1) instructing in terms of common-law proximate causation instead of the much broader terminology of the FELA; (2) omitting any definition of proximate cause, when it was couched in binding terms; (3) excluding speculation as to injury and damages; and (4) excluding presumptions as a basis for inference of negligence."

Appellee's instruction #3, the one here challenged, is as follows:

> "You are instructed that no presumption arises from the mere happening of an injury to a railroad employee

and you cannot guess, surmise or speculate on the issues of negligence, proximate cause or damages. The burden of proof is on the plaintiff to establish by a preponderance of the evidence all of the following: (1) that the defendant railroad was guilty of negligence; (2) that such negligence, if any, was a proximate cause of the plaintiff's injury and damage, if any.

If you find and believe that the evidence on any one of these points does not preponderate in favor of the plaintiff, or that the evidence in regard thereto is evenly balanced, then your verdict must be in favor of the defendant, Missouri Pacific Railroad Company."

The appellant objected, both generally and specifically, to the giving of this Instruction #3 as follows:

"(The court gave such instruction over the general objections of the plaintiff. The plaintiff further specifically objected to said instruction because it erroneously states there is no presumption from the happening of an accident, when under FELA it has been frequently held that the rule of res ipsa loquitur freely applies; further, since there is evidence of negligence an instruction in terms of legal presumptions is misleading and superfluous; it erroneously tells the jury that plaintiff has the burden of proving that the negligence of the railroad was a proximate cause of the plaintiff's injury, which places a higher burden on plaintiff than the statute requires, since the statute only requires a showing that negligence 'in whole or in part' caused injury; the instruction is predicated on a 1947 decision which was long since qualified or overruled.)"

This appeal poses the following question: Is negligence which is "a proximate cause" of an injury the same as negligence which "in whole or in part" causes an injury?

It is well settled that when the correctness of instructions to a jury is a question, the instruction complained of must be examined in conjunction with all the instructions given.

The appellant in this case requested four instructions which were given as follows:

"Plaintiff's Instruction No. 2. The Federal Employers Liability Act, which was in force at the time of this occurrence, provides that whenever an employee of a railroad is injured while engaged in the course of his employment, and the *injury results in whole or in part* from the negligence of any of the officers, agents or other employees of the railroad, then the railroad shall be liable in damages to the injured employee. (Emphasis added) **

** No. 4. Under the terms of the Federal Employers' Liability Act, in any action brought against a railroad to recover damages for injury to an employee, the employee shall not be held to have assumed the risks of his employment in any case where the *injury resulted in whole or in part* from the negligence of any of the officers, agents or employees of the railroad. (Emphasis added) **

** No. 6. If you find from a preponderance of the evidence that defendant railroad failed to use ordinary care to provide plaintiff a reasonably safe place to work and was therefore negligent and such negligence, if any, *in whole or in part caused* plaintiff to be injured, your verdict should be for plaintiff. (Emphasis added) **

** No. 8. If you find from a preponderance of evidence that plaintiff was injured and that defendant was negligent, and that such negligence, *in whole or in part, caused* plaintiff's injury, then the fact that because of a previous injury in the same area of his body plaintiff may have been susceptible to injury than would otherwise have been the case, if you so find, would not affect his right to recover for his present injury, if any. (Emphasis added)***"

Therefore the jury was instructed that if the defendant's negligence, in whole or in part, caused plaintiff's injury the railroad company would be liable in damages. We do not conclude that defendant's (appellee's) instruction #3 is in conflict with the four instructions which the appellant requested and which were given, nor does instruction #3 vary "the injury results in whole or in part", as given in appellant's instructions.

It is noted that the court said, in instruction #3:

> "(1) that the defendant railroad was guilty of negligence; (2) that such negligence, if any, was *a* proximate cause of the plaintiff's injury and damage, if any. **** [Emphasis added]

The use of the indefinite article "a" in connection with "proximate cause" was before this court in the case of *Ludon, et al.* v. *Dean*, 222 Ark. 367, 260 S.W. 2d 465, where we found error in an instruction in which the trial court changed the reading of the instruction by changing "a proximate cause" to "the proximate cause."

Reading appellant's four instructions in connection with appellee's instruction #3, which is complained of here, we find no variance or conflict.

Appellant contends, however, that under FELA the happening of an accident justifies a presumption of negligence as the doctrine of res ipsa loquitur applies.

The phrase, res ipsa loquitur, is a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented. It is true that the U. S. Supreme Court has applied res ipsa loquitur in FELA cases, but only where there is present recognized requirements of extraordinary unusual occurrences. The application of res ipsa loquitur in FELA cases is well set forth in *Herdman* v. *Pennsylvania Ra. Co.*, 77 S. Ct. 455, 1 L. ed. 2d 508, 352 US 518:

> "**** The proofs do not meet the tests laid down by this Court in *Jesionowski* v. *Boston & M. R. Co.* 329 US

452, 91 L. ed. 416, 67 S. Ct 401, 169 ALR 947, 21 NCCA NS 563. The employee's injuries in the Jesionowski Case resulted from a derailment. This Court held that derailments are 'extraordinary, not usual happenings,' so that when they occur 'a jury may fairly find that they occurred as a result of negligence.' "

The extraordinary circumstances that make applicable the doctrine of res ipsa loquitur are absent in this case. The appellant pinpoints the cause of his injury; that is, that the journal box was defective, requiring extraordinary force and that when the lid of the journal box gave way he stepped back suddenly and stepped back on some object that he alleged the appellee had left at that location and that he was therefore not furnished with a safe place to work. The doctrine of res ipsa loquitur does not apply in this case.

The judgment of the trial court is, therefore, affirmed.

IN THE SUPREME COURT OF ARKANSAS

DAVID W. PURNELL, *Appellant*,

vs.

MO. PAC. RD. CO., *Appellee*

Appeal from Pulaski Circuit Court, Third Division

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, Third Division, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is, therefore, considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all its costs in this court, in this cause expended, and have execution thereof.

December 17, 1962.